I-16688

ELLIS LAWHORNE

John J. Pringle, Jr.
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

November 8, 2005

VIA HAND DELIVERY
The Honorable Charles L.A. Terreni
Chief Clerk
Public Service Commission of South Carolina
Synergy Business Park
101 Executive Center Drive
Columbia, SC 29210

RE: NuVox Communications, Inc and Xspedius Communications LLC v. Public Service Commission of South Carolina and BellSouth Telecommunications, Inc.; **Case Numbers: 05-CP-40-5785 and 3:05-cv-03122; Our File No. 528-10272**

Dear Mr. Terreni:

Enclosed for service upon the Public Service Commission of South Carolina (and, with respect to the federal court action, the Commissioners in their official capacities) are the following:

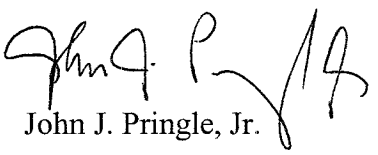
1. Summons, Richland County Court of Common Pleas;
2. Certificate of Exemption from Mediation;
3. Petition for Judicial Review;
4. Summons, Columbia Division of the United District Court of South Carolina;
5. Complaint for Declaratory and Injunctive Relief; and,
6. Local Rule 26.01 Answers to Interrogatories.

It is my understanding that you have graciously agreed to accept service of the above listed documents filed with the Richland County Court of Common Pleas and with the Columbia Division of the United States District Court of South Carolina.

Please stamp "received" the additional copy of this letter, and return the copy with the bearer of these documents.

With kind regards, I am

Yours truly,



John J. Pringle, Jr.

Enclosures

cc: John Heitmann, Esquire
Susan Berlin, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

NUVOX COMMUNICATIONS, INC.

and

XSPEDIUS COMMUNICATIONS, LLC,

Plaintiffs,

v.

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA, and RANDY MITCHELL, G. O'NEAL HAMILTON, JOHN E. HOWARD, DAVID A. WRIGHT, ELIZABETH B. FLEMING, MIGNON L. CLYBURN, and C. ROBERT MOSELY, in their official capacities as Commissioners of the Public Service Commission of South Carolina, and BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendants.

Case 3:05-cv-3122-MBS

SUMMONS IN A CIVIL ACTION

TO: The PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA and, acting in their official capacities as Commissioners of the Public Service Commission of South Carolina:
RANDY MITCHELL
G. O'NEAL HAMILTON
JOHN E. HOWARD
DAVID A. WRIGHT
ELIZABETH B. FLEMING
MIGNON L. CLYBURN
C. ROBERT MOSELY
and
BELLSOUTH TELECOMMUNICATIONS, INC.,

YOU ARE HEREBY SUMMONDED and required to serve upon PLAINTIFF'S ATTORNEY (name and address):

JOHN J. PRINGLE, JR
ELLIS LAWHORNE & SIMS, P.A.
P.O. BOX 2285
COLUMBIA, SC 29202

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

LARRY W. PROPES
CLERK

NOV 7 2005
DATE

(By) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

NUVOX COMMUNICATIONS, INC.

and

XSPEDIUS COMMUNICATIONS, LLC,

Plaintiffs,

v.

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA, and RANDY MITCHELL, G. O'NEAL HAMILTON, JOHN E. HOWARD, DAVID A. WRIGHT, ELIZABETH B. FLEMING, MIGNON L. CLYBURN, and C. ROBERT MOSELY, in their official capacities as Commissioners of the Public Service Commission of South Carolina, and BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendants.

Case 05-cv-_____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs NUVOX COMMUNICATIONS, INC. ("NuVox") and XSPEDIUS COMMUNICATIONS, LLC, on behalf of its operating subsidiaries ("Xspedius"), through counsel, as and for their Complaint, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs NuVox and Xspedius seek review of two final orders of the Public Service Commission of South Carolina ("Commission") on the ground that they violate federal law, abrogate a valid contract in violation of the Contract Clause of the United States and South

Carolina Constitutions, and should be vacated as unlawful and unreasonable agency decisions in accordance with Sections 58-9-1410 and 1-23-380 of the South Carolina Code.

2. The Orders from which Plaintiffs seek relief were issued by the Commission in connection with an arbitration over which it presides pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). The Commission is required by that statute to arbitrate interconnection agreements between incumbent local exchange carriers ("ILECs"), such as BellSouth Telecommunications, Inc. ("BellSouth") and competitive LECs ("CLECs"), such as NuVox and Xspedius. Their decisions must comport with the 1996 Act and with the rules and decisions of the Federal Communications Commission ("FCC"), and are reviewable in any federal district court of competent jurisdiction.

JURISDICTION AND VENUE

3. This action is brought under 47 U.S.C. § 252(e)(6). In addition, Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201.

4. The Court has subject matter jurisdiction pursuant to 47 U.S.C. § 252(e)(6), and 28 U.S.C. §§ 1331 and 1337. The Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this District under 28 U.S.C. § 1391(b). Defendants reside in the State of South Carolina. Defendant Commission resides and performs its official duties in this District. The events giving rise to the claims asserted herein occurred in this District. This Court is "an appropriate Federal District Court" as set forth in 47 U.S.C. § 252(e)(6).

PLAINTIFFS

6. Plaintiff NUVOX COMMUNICATIONS, INC. is a corporation organized under the laws of Delaware with its principal place of business at 2 Main Street, Greenville, South Carolina 29601. NuVox is a CLEC within the meaning of Section 252 of the 1996 Act. NuVox has provided telecommunications services, including local and long-distance calling and high-speed data transmission services, in South Carolina since 1998.

7. Plaintiff XSPEDIUS COMMUNICATIONS, LLC is a limited liability corporation organized under the laws of Delaware with its principal place of business at 5555 Winghaven Blvd., O'Fallon, Missouri 63368. Xspedius is a CLEC within the meaning of Section 252 of the 1996 Act. It has provided telecommunications services, including local and long-distance calling and high-speed data transmission services, in South Carolina since August 2002, when it acquired substantially all of the assets of CLEC e.spire Communications.

DEFENDANTS

8. Defendant PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA is a state agency created by statute to regulate, among other things, the services and operations of telecommunications companies within South Carolina. The Commission is located at 101 Executive Center Dr., Suite 100, Columbia, SC 29210. The Commission is a "State Commission" within the meaning of Section 252 of the 1996 Act.

9. RANDY MITCHELL, G. O'NEAL HAMILTON, JOHN E. HOWARD, DAVID A. WRIGHT, ELIZABETH B. FLEMING, MIGNON L. CLYBURN, and C. ROBERT MOSELY are Commissioners serving on the Commission, with powers set forth in the laws of the State of South Carolina and who are being sued in their official capacities. Their business address is 101 Executive Center Dr., Suite 100, Columbia, SC 29210.

10. Defendant BELLSOUTH TELECOMMUNICATIONS, INC. is a telecommunications company organized under the laws of Georgia with its headquarters at 1155 Peachtree Street, N.E., Atlanta, Georgia 30309. Its principal place of business in this State is 1600 Williams Street, Suite 5200, Columbia, SC 29201. BellSouth is an incumbent local exchange carrier within the meaning of Section 252 of the 1996 Act and is licensed to do business and provide telecommunications service in this State.

FACTS

A. Section 252 Interconnection Arbitrations

11. The 1996 Act, which Congress enacted in order to "shift monopoly markets to competition as swiftly as possible," H.R. Conf. Rep. 104-204, 104th Cong. 2d Sess. at 89, requires ILECs to provide CLECs with access to the local telecommunications network through a process termed "interconnection" and through the lease, at cost-based rates, of individual component parts of the network, or "unbundled network elements" ("UNEs"). Section 251 of the 1996 empowers and requires the FCC to identify which network components must be provided as UNEs.

12. A network element must satisfy two criteria in order to identified as a UNE: (1) if proprietary, that component must be "necessary" for a CLEC to serve customers; and (2) if not proprietary, that component, if not provided, would "impair" a CLEC's ability to serve customers. These statutory criteria are summarized as the "necessary and impair test." Elements satisfying these criteria must be provided to CLECs at rates set in accordance with federal costing principles promulgated by the FCC in 1996, known as "Total Element Long-Run Incremental Cost," or "TELRIC."

13. The terms of local network access are secured through contracts known as "interconnection agreements." These agreements are formed principally through negotiation, which ILECs are compelled to negotiate with CLECs, but when negotiations prove fruitless, Section 252 of the 1996 Act enables either party to seek arbitration of any negotiated provision, and the provisions necessary to implement the contract, before the resident State Commission.

14. The State Commission must resolve all issues in a reasonable and nondiscriminatory manner and in accordance with all FCC rules and decisions. If the State Commission fails to resolve an arbitration within 90 days of its filing, the FCC must accept and resolve the arbitration. Any State Commission or FCC decision within an arbitration may be reviewed in federal court.

15. NuVox and Xspedius presently have interconnection agreements ("ICAs") with BellSouth. The NuVox-BellSouth ICA has been effective since June 30, 2000, and the Xspedius-BellSouth ICA has been effective since December 30, 2002.

16. The NuVox and Xspedius ICAs expressly permit NuVox and Xspedius to order UNEs from BellSouth at Commission-approved, TELRIC-compliant rates. These ICAs also include provisions requiring re-negotiation when changes of law occur.

B. Plaintiffs' Arbitration and Abeyance Agreement with BellSouth

17. The NuVox and Xspedius ICAs expired by their terms in 2004, prompting these CLECs to begin, on a collective basis, interconnection negotiations with BellSouth in early 2003. By their terms, the ICAs remain effective until superceded by new ICAs approved by the Commission.

18. On February 11, 2004, NuVox and Xspedius filed Petitions for Arbitration in each of the nine states in which BellSouth is the ILEC, including the South Carolina Public Service

Commission ("Arbitrations"). On March 10, 2004, during the course of these individual arbitrations, the *Triennial Review Order*, an FCC order identifying the UNEs available to CLECs, was vacated by the federal Court of Appeals for the District of Columbia Circuit, in a case captioned *United States Telecom Association v. FCC*, or "*USTA II*."

19. The *vacatur* of the *Triennial Review Order* caused regulatory uncertainty as to which network elements remain UNEs and thus must be provided at cost-based rates. On June 14, 2004, former FCC Chairman Michael Powell released a statement that he would ensure that, within a short time, a set of interim rules governing network elements and UNEs would be issued. Chairman Powell also stated that permanent or final rules would be issued subsequent to the interim rules.

20. Due to the uncertain legal backdrop of the Arbitrations and the then imminent schedule of arbitration hearings, Plaintiffs and BellSouth formed an agreement on June 29, 2004, to withdraw the Petition for Arbitration before the Commission, thus halting the proceeding, pending the FCC's promulgation of rules to replace the *Triennial Review Order* consistent with the findings in *USTA II*. This agreement, known as the "Abeyance Agreement," was memorialized in a co-written Joint Motion to each State Commission in the BellSouth Region, including the South Carolina Public Service Commission, and was signed by counsel for both Plaintiffs and BellSouth.

21. The Abeyance Agreement states, in pertinent part, that "[t]he Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement," and that "any new issues added to a subsequent petition for arbitration will be limited to issues that

result from the parties' negotiations relating to USTA II and its progeny." **Exhibit 1**. The Joint Motion was filed July 16, 2004.

22. The Commission released an order granting the Joint Motion on October 6, 2004. That order stated that "[b]oth the Joint Movants and BellSouth have agreed that they will continue to operate under their current Commission approved interconnection agreements until such time as they move into a new agreement[.]" **Exhibit 2**.

C. The FCC's *Interim Rules Order*

23. On August 20, 2004, the FCC released the *Interim Rules Order*, in which the FCC promulgated, "on an interim basis," rules comporting with the findings of *USTA II* during the period in which final rules were being drafted. The FCC stated that the *Interim Rules Order* was "designed to avoid disruption in the telecommunications industry while these new rules are being written." **Exhibit 3**.

24. The *Interim Rules Order* also requested comment from interested parties on the FCC's proposed plan to effect the changes required by *USTA II* to the UNE rules. The result of that proceeding would be final rules governing which elements remain UNEs, and the terms and conditions under which other elements must be provided. The FCC also stated in that order that "we expressly preserve incumbent LECs' contractual prerogatives to initiate change-of-law proceedings to the extent consistent with their governing interconnection agreements." The FCC prescribed only 21 days to file initial comments, and 15 days to file reply comments. Chairman Powell stated in a subsequent news release that final rules would be promulgated as soon as possible.

D. The FCC's *Triennial Review Remand Order*

25. The *Triennial Review Remand Order* ("*TRRO*"), presently under appeal to the D.C. Circuit, states, in pertinent part, that several components of the local telecommunications no longer meet the "necessary and impair test." As such, those components are no longer UNEs and need not be provided to CLECs at TELRIC-based rates. The effective date of the *TRRO* was March 11, 2005.

26. The *TRRO* states that the regulatory changes it effects must be implemented through negotiation between ILECs and CLECs. Paragraph 233 of the *TRRO* states "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action."

27. The *TRRO* also states that implementation must follow "change of law processes," which refers to the provisions in existing ICAs that require parties to request and conduct good faith negotiations in order to implement a change of law impacting the terms of that agreement.

E. Plaintiffs' Petition for Rehearing or Reconsideration and the Orders

28. On February 11, 2005, BellSouth posted and transmitted a form letter stating that as of March 11, 2005, it would no longer fill new orders for any of several network elements at TELRIC-based rates. This position became known as "no new adds." Additional letters followed that clarified and expanded BellSouth's position. **Exhibit 4.**

29. On March 2, 2005, NuVox and Xspedius filed a Petition for Emergency Relief requesting that the Commission order BellSouth not to act on its Carrier Notification Letter.

Exhibit 5. Plaintiffs explained that the *TRRO* on its face requires BellSouth to negotiate with all CLECs in order to implement its rule changes. Plaintiffs also demonstrated that the Abeyance Agreement is a valid and binding contract between NuVox, Xspedius, and BellSouth, and prevents amendment of those ICAs to effectuate changes of law regarding unbundling (such changes are to be incorporated into the new ICAs that will result from the pending arbitration).

30. On August 1, 2005, the Commission issued Order No. 2005-247, which stated that, after June 8, 2005, "CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain charateristics defined in the TRRO, and dark fiber." The Order also stated that "[t]he scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC's Petition; therefore it is this Commission's determination that the Abeyance Agreement does not offer CLEC Petitioners an alternative method of relief." **Exhibit 6**.

31. On August 25, 2005, NuVox and Xspedius filed a Petition for Rehearing or Reconsideration of Order No. 2005-247. **Exhibit 7.**

32. On October 3, 2005, the Commission released an Order denying the Petition for Rehearing or Reconsideration. **Exhibit 8.** The August 1 Order and October 3 Order are addressed collectively herein as "the *Orders*."

COUNT I

VIOLATION OF SECTION 252 OF THE 1996 ACT (Declaratory Judgment)

33. Plaintiffs incorporate the allegations in Paragraphs 1 through 32 as if expressly included herein.

34. The *Orders* abrogate plain language in the Commission-approved NuVox ICA and Xspedius ICA, thus violating Congress's mandate in Sections 251 and 252 of the 1996 Act.

35. The *Orders* also deprive NuVox and Xspedius of the right to cost-based access to network elements in violation of Sections 251 and 252 of the 1996 Act.

36. The *Orders* have the effect of unilaterally amending the NuVox ICA and the Xspedius ICA in an unreasonable manner in violation of Sections 251 and 252 of the 1996 Act.

37. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT II

VIOLATION OF U.S. CONST. ART. I, SEC. 10 and S.C. CONST. ART. I, SEC. 4

38. Plaintiffs incorporate the allegations in Paragraphs 1 through 37 as if expressly included herein.

39. Article I, Section 10 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution prohibit the Commission from impairing the obligations of contracts.

40. The *Orders* impair the Abeyance Agreement, a contract that was lawfully negotiated, entered into and ratified in writing by Plaintiffs and BellSouth. In so doing, the *Orders* violate the Constitutions of the United States and South Carolina, as well as federal and South Carolina law regarding the validity of contracts, and as such exceed the Commission's authority.

41. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT III

VIOLATION OF S.C. CODE SEC. 1-23-380(A)(6)(a)

42. Plaintiffs incorporate the allegations in Paragraphs 1 through 41 as if expressly included herein.

43. State agency orders that violate any statute or constitutional provision are reversible by the Court pursuant to Section 1-23-380(A)(6)(a) of the South Carolina Code.

44. The *Orders* violate Article I, Section 10 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution.

45. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT IV

VIOLATION OF S.C. CODE SEC. 1-23-380(A)(6)(f)

46. Plaintiffs incorporate the allegations in Paragraphs 1 through 45 as if expressly included herein.

47. State agency orders that are arbitrary and capricious, or that constitute an abuse of discretion or a clearly unwarranted exercise of discretion, are reversible by the Court pursuant to Section 1-23-380(A)(6)(f) of the South Carolina Code.

48. The *Orders* fail to comport with the mandates of Section 252 of the 1996 Act, and are therefore arbitrary and capricious.

49. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT V

INJUNCTIVE RELIEF

50. Plaintiffs incorporate the allegations in Paragraphs 1 through 49 as if expressly included herein.

51. Plaintiffs are entitled to injunctive relief because there is no adequate remedy at law to address the unlawful and inequitable impact of the Commission's *Orders*.

PRAYER FOR RELIEF

52. WHEREFORE, Plaintiffs ask that the Court grant the following relief:

1. Declare that the *Orders* violate Sections 251 and 252 of the 1996 Act;

2. Declare that the *Orders* violate Article I, Section 10 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution;

3. Declare that the *Orders* are unconstitutional and contrary to law under Section 1-23-380(A)(6)(a) of the South Carolina Code;

4. Declare that the *Orders* are arbitrary and capricious agency actions under Section 1-23-380(A)(6)(f) of the South Carolina Code;

5. Order BellSouth to adhere to the Abeyance Agreement by continuing to fulfill orders for all UNEs contained in Plaintiffs' existing interconnection agreements at the TELRIC-compliant rates therein until new interconnection agreements are approved by the South Carolina Public Service Commission;

6. Permanently enjoin the Defendants from enforcing the Orders or otherwise taking action that violate the above-referenced constitutional and statutory provisions; and

7. Award Plaintiffs such other relief as may be appropriate.

Dated: November 3, 2005

ELLIS, LAWHORNE & SIMS, P.A.

By: /S John J. Pringle, Jr.
John J. Pringle, Jr. (Federal I.D. No. 6870)
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, Fifth Floor
P.O. Box 2285
Columbia, SC 29202
Phone: 803-254-4190

John J. Heitmann *
Stephanie A. Joyce *
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Phone: 202-955-9600

Applications for admission *pro hac vice* to be filed

EXHIBIT ONE

ELLIS : LAWHORNE

John J. Pringle, Jr
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

July 16, 2004

VIA ELECTRONIC MAIL AND HAND-DELIVERY
The Honorable Bruce Duke
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, **Docket No. 2004-42-C, Our File No. 803-10208**

Dear Mr. Duke:

Enclosed are the original and ten (10) copies of the **Joint Motion to Withdraw Petition for Arbitration** for filing in the above-referenced docket.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it with the bearer of these documents. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: John J. Heitmann, Esquire
all parties of record

Enclosures
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BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-42-C

In the Matter of	)
	)
Joint Petition for Arbitration of	)
	)
NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC. KMC TELECOM V, INC., KMC TELECOM III LLC, and XSPEDIUS COMMUNICATIONS, LLC on Behalf of its Operating Subsidiaries XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF CHARLESTON, LLC, XSPEDIUS MANAGEMENT CO. OF COLUMBIA, LLC, XSPEDIUS MANAGEMENT CO. OF GREENVILLE, LLC, and XSPEDIUS MANAGEMENT CO. OF SPARTANBURG, LLC	)
	)
Of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)

JOINT MOTION TO WITHDRAW
PETITION FOR ARBITRATION

NewSouth Communications Corp. ("NewSouth"); NuVox Communications, Inc. ("NuVox"); KMC Telecom V, Inc.("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC

("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") (collectively, "Xspedius") (collectively, the "Joint Petitioners" or "CLECs"), by their attorneys and pursuant to S.C. Code § 58-3-225(E) hereby move for an Order of the Public Service Commission of South Carolina ("Commission") granting Joint Petitioners leave to withdraw their Petition for Arbitration without prejudice to the refiling of same. BellSouth Telecommunications, Inc. ("BellSouth") joins in and supports this Motion. In support, the Parties would show the Commission the following:

1. On February 11, 2004, Joint Petitioners filed their Petition for Arbitration with BellSouth.

2. The Commission assigned the matter Docket No. 2004-42-C.

3. On June 22, 2004, Joint Petitioners filed their Direct Testimony in the Docket.

4. Because the Joint Petitioners have already filed direct testimony in this Docket, S.C. Code § 58-3-225(E) requires Joint Petitioners to obtain an Order of the Commission allowing them to withdraw their Petition.

5. Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by *USTA II*[1], as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any

[1] *United States Telecom Ass'n v FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion. Additionally, the Parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to *USTA II* and its progeny.

6. The Parties submit that allowing the Petitioners to withdraw their Petition without prejudice to the refiling of same serves the public interest. Particularly, no party will be prejudiced by withdrawal of the Petition, because no party will waive or lose any procedural or substantial right as a result of withdrawal.

WHEREFORE, the Parties respectfully request that the Commission issue an Order granting Joint Petitioners leave to withdraw their Petition for Arbitration without prejudice to the refilling of same, and grant any other relief as the Commission may deem just and proper.

Respectfully submitted,

John J. Pringle, Jr.
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street, Fifth Floor, P.O. Box 2285
Columbia, SC 29202
Tel. 803-254-4190/803-343-1270 (direct)
Fax 803-799-8479
jpringle@ellislawhorne.com

Counsel for the Joint Petitioners

Patrick Turner signed with permission

Patrick Turner
BellSouth Telecommunications, Inc.
PO Box 752
Columbia SC 29202-0752
Tel. 803/401-2900
Fax 803/254-1731
patrick.turner@bellsouth.com

Counsel for BellSouth Telecommunications, Inc.

BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-42-C

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
NewSouth Communications, Corp.,	)	
NuVox Communications, Inc.,	)	
KMC Telecom V, Inc.,	)	**CERTIFICATE OF SERVICE**
KMC Telecom III LLC, and	)	
Xspedius [Affiliates] of an	)	
Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934,	)	
as Amended	)	

This is to certify that I have caused to be served this day, one (1) copy of the **Joint Motion to Withdraw Petition for Arbitration** via first-class and electronic mail service addressed as follows:

Patrick Turner, Esquire
BellSouth Telecommunications, Inc.
PO Box 752
Columbia SC 29202

David Butler, Esquire
South Carolina
Public Service Commission
PO Drawer 11649
Columbia, SC 29211

Carol Roof

July 16, 2004
Columbia, South Carolina
F:\APPS\OFFICE\WPWIN\WPDOCS\KMC_NewSouth_Nuvox_Xspedius\cert.service.wpd

EXHIBIT TWO

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-42-C - ORDER NO. 2004-472

OCTOBER 6, 2004

IN RE: Joint Petition for Arbitration of New South Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius (Affiliates) of an Interconnection Agreement with BellSouth Telecommunications, Inc.	))))))	ORDER GRANTING JOINT MOTION FOR LEAVE TO WITHDRAW

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Joint Motion to Withdraw the Petition for Arbitration in this case. The Joint Movants move for an Order granting them leave to withdraw their Petition for Arbitration without prejudice to refiling of same. BellSouth Telecommunications, Inc. (BellSouth) joins in and supports the Motion.

The Joint Movants seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by *United States Telecom Association v. FCC,* 359 F. 3d 554 (D.C. Cir. 2004)("USTA II"), as well as to continue to negotiate previously identified issues outstanding between the Joint Movants and BellSouth. Both the Joint Movants and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion. Additionally, the Parties agree that any new issues added to a subsequent petition for

arbitration will be limited to issues that result from the Parties' negotiations relating to USTA II and its progeny.

The Parties submit that allowing the Petitioners to withdraw their Petition without prejudice to the refiling of same serves the public interest. No party will be prejudiced by withdrawal of the Petition, because no party will waive or lose any procedural or substantial right as a result of withdrawal.

Accordingly, the parties request that the Commission issue an Order granting the Joint Movants leave to withdraw their Petition for Arbitration without prejudice to the refiling of same. We grant the Motion. The parties are hereby allowed to withdraw their Petition, without prejudice, and under the terms stated in the Joint Motion to Withdraw.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice Chairman

(SEAL)

EXHIBIT THREE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: July 21, 2004 **Released:** August 20, 2004

Comment Date: [21 Days after publication in the Federal Register]
Reply Comment Date: [36 Days after publication in the Federal Register]

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

I. INTRODUCTION

1. Today, we issue a Notice of Proposed Rulemaking (Notice) in which we solicit comment on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.[2] We also issue an Order in which we take several steps designed to avoid disruption in the telecommunications industry while these new rules are being written. The actions we take today are designed to advance the Commission's most important statutory objectives: the promotion of competition and the protection of consumers. If the Commission does not act, the $127 billion local telecommunications market will unnecessarily be placed at risk. To that end, we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching,[3] enterprise market loops, and

[1] We refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the Communications Act or the Act. *See generally* 47 U.S.C. § 151 *et seq.*

[2] 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets for cert filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*). The *USTA II* mandate issued on June 16, 2004.

[3] Throughout this Notice and Order, references to unbundled switching encompass mass market local circuit switching and all elements that must be made available when such switching is made available.

dedicated transport[4] under the same rates, terms and conditions that applied under their interconnection agreements[5] as of June 15, 2004.[6] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e g* , an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.

2. The one-year transitional regime described above is designed to provide a reasonable timeframe for the Commission to complete its work while interim protections remain in place. Eight years after the initial implementation of the local competition provisions of the Act, the Commission continues to search for unbundling rules that identify where carriers are genuinely impaired and where overbroad unbundling works to frustrate sustainable, facilities-based competition. As the Commission has repeatedly recognized, our primary goal in implementing section 251 is to advance the development of facilities-based competition.[7] We believe that unbundling rules based on a preference for facilities-

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[4] The D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings regarding enterprise market loops. Some carriers have taken the position that those rules have been vacated. *See, e g*., Letter from Jerry Hendrix, Assistant Vice President Interconnection Services, BellSouth, to Stephen G. Huels, Region Vice President, AT&T (Apr. 30, 2004) *in* Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at attach. 7 (filed May 7, 2004) ("The D.C. Circuit Order explicitly vacated the Federal Communications Commission's (FCC) national impairment finding for DS1, DS3 and dark fiber elements. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Act to offer these elements and, at that time, BellSouth will pursue the legal and regulatory options available to it."); Verizon Reply, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Apr. 5, 2004) ("Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all."). We do not take a position on that question here; but to ensure a smooth transition governed by clear requirements, we assume *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules.

[5] Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs.

[6] These obligations apply irrespective of whether an incumbent LEC has taken steps before or after this date to relieve itself of such obligations.

[7] *See Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984, para. 3 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020, 19021, paras. 12-13, 15, 17 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, USTA II*, (continued....)

EXHIBIT FOUR

Attachment "A"

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5]

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005..."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former Unbundled Network Elements ("UNE") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on Incumbent Local Exchange Carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing Interconnection Agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing Interconnection Agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing Interconnection Agreements. Therefore, while BellSouth will not breach its Interconnection Agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005, BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1, **HDSL** and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing Interconnection Agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any

[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶¶ 198

EXHIBIT FIVE

ELLIS : LAWHORNE

John J. Pringle, Jr.
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

March 2, 2005

VIA ELECTRONIC MAIL AND HAND-DELIVERY
The Honorable Charles L.A. Terreni
Executive Director
SC Public Service Commission
P.O. Drawer 11649
Columbia, SC 29211

RE: Petition to Establish Generic Docket to Consider Amendments
To Interconnection Agreements Resulting from Changes of Law
Docket No. 2004-316-C, Our File No. 528-10272

Dear Mr. Terreni:

Enclosed is the original and ten (10) copies of the **Petition for Emergency Relief** filed by NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") ("Xspedius"), KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V") (collectively, "Joint Petitioners") in the above-referenced docket.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect. If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: John J. Heitmann Esquire
Heather T. Hendrickson, Esquire
all parties of record
Enclosures

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-316-C

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law Docket	)	**PETITION FOR EMERGENCY RELIEF**
	)	

COMES NOW, NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") ("Xspedius"), KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V") (collectively, "Joint Petitioners") pursuant to Commission Rules 103-835 and 836 and the statutory authority set out herein, requesting that the South Carolina Public Service Commission ("Commission") issue an Emergency Declaratory Ruling finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into by and between BellSouth and Joint Petitioners (collectively, "the Parties").

Joint Petitioners bring the instant matter before the Commission in light of BellSouth's February 11, 2005 Carrier Notification and February 25, 2005 Revised Carrier Notification stating that certain provisions of the FCC's *Triennial Review Remand Order* ("*TRRO*") regarding new orders for de-listed UNEs ("new adds") are self-effectuating as of

March 11, 2005.[1] BellSouth's pronouncement is based on a fundamental misreading or the *TRRO*. As with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. It is not self-effectuating, as BellSouth claims. To the contrary, the FCC clearly stated that the *TRRO* and the new Final Rules issued therewith would be incorporated into interconnection agreements via the section 252 process, which requires negotiation by the Parties and arbitration by the Commission of issues which Parties are unable to resolve through negotiations.

Thus, as with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. NuVox, KMC and Xspedius have agreed with BellSouth that the *TRRO*, as well as the older *TRO* changes in law will be incorporated into their new arbitrated interconnection agreements. Accordingly, the Parties' new interconnection agreements will incorporate, *inter alia*, older *TRO* changes of law more-favorable-to-Joint Petitioners (such as commingling rights and clearer EEL eligibility criteria), as well as newer *TRRO* changes of law more-favorable-to-BellSouth (such as limited section 251 unbundling relief). The Parties' new South Carolina interconnection agreements certainly will not be in place by March 11, 2005.

BellSouth has taken an all or nothing approach to the *TRO* and past changes of law and it should not be permitted to pick-and-choose out of the *TRRO* the changes-of-law that are most favorable to it, while making NuVox and others wait-out arbitrations and/or the generic docket proceeding to get the *TRO* changes, such as commingling and clearer EEL eligibility criteria that are more favorable to them. In South Carolina, a generic proceeding has been

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[1] BellSouth Carrier Notification at 1. BellSouth filed its Carrier Notification with the Commission in Docket No. 2004-316-C on February 14, 2005 (BellSouth Notice of Submission , Attachment). A copy of the Carrier Notification is attached hereto as Exhibit 1. BellSouth revised its Carrier Notification on February 25, 2005. A copy of the Revised Carrier Notification is attached hereto as Exhibit 2.

established (2004-316-C), and the Joint Petitioners intend to re-file for arbitration next week. Until the Parties are through these proceedings (or otherwise reach negotiated resolution) they must abide by their existing interconnection agreements. That is what the interconnection agreements require. That is what the Parties' Abeyance Agreement requires. That also is what the *TRRO* requires. And that is what is fair.

The Commission must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend Joint Petitioners' existing interconnection agreements. Importantly, the Commission's action must address all "new adds."[2] For facilities-based carriers like Joint Petitioners, high capacity loops and high capacity transport UNEs are essential and they are jeopardized by BellSouth's Carrier Notification.

Joint Petitioners will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreements and Abeyance Agreement by refusing to accept local service requests ("LSRs") for new DS1 and DS3 loops and transport that BellSouth claims is delisted by application of the Final Rules. Although used by Joint Petitioners to a lesser extent, the same is true for UNE-P. Furthermore, South Carolina consumers relying on Joint Petitioners' services will be harmed if BellSouth is permitted to implement its announced plan to breach and/or unilaterally modify interconnection agreements by refusing to accept LSRs for "new adds" as of March 11, 2005. South Carolina businesses and consumers could be left without ordered services while the Parties sort-out the

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2 On March 1, 2005, the Georgia Commission voted to prevent BellSouth from taking action to unilaterally implement the *TRRO* with respect to all "new adds" as proposed in BellSouth's Carrier Notification. In voting to adopt the Georgia Commission Staff's recommendation, the Georgia Commission made clear that the Commission's decision applied to all carriers and all "new adds" (*i.e.*, it is not limited to MCI or UNE-P). A copy of the Georgia Commission's Staff Recommendation is attached hereto as Exhibit 3. A final written order from the Georgia Commission is not yet available.

morass that will be created by BellSouth's unilateral decision to reject certain UNE orders. The resulting morass also likely would lead to a flood of litigation and complaint dockets before the Commission.

Accordingly, Joint Petitioners seek expeditious consideration of this matter and an Order declaring *inter alia* that Joint Petitioners shall have full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such time that those agreements are replaced by new interconnection agreements resulting from the upcoming arbitration between the Parties.

PARTIES

1. NuVox is a Delaware corporation with its principal place of business at 2 Main Street, Greenville, SC 29601. NuVox holds a Certificate of Public Convenience and Necessity issued by the Commission that authorizes it to provide local exchange service in South Carolina. NuVox is a "telecommunications carrier" and "local exchange carrier" under the Communications Act of 1934, as amended ("the Act").

2. KMC III is a Delaware limited liability company and KMC V is a Delaware corporation. Both entities have their principal place of business at 1755 North Brown Road, Lawrenceville, Georgia 30043. KMC III and KMC V each hold a Certificate of Public Convenience and Necessity issued by the Commission that authorizes them to provide local exchange service in South Carolina. Each entity is a "telecommunications carrier" and "local exchange carrier" under the Act.

3. Xspedius is a Delaware limited liability company with its principal place of business at 5555 Winghaven Boulevard, O'Fallon, Missouri 63366. Xspedius holds various Certificates of Public Convenience and Necessity issued by the Commission that authorizes it to

provide local exchange service in South Carolina. Xspedius is a "telecommunications carrier" and "local exchange carrier" under the Act.

4. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Act, and S.C. Code Ann. § 58-9-10.

JURISDICTION

5. BellSouth and Joint Petitioners are subject to the jurisdiction of the Commission respecting matters raised in this Petition.

6. The Commission has jurisdiction over the matters raised in this Petition pursuant to S.C. Code Ann. § 58-3-140 (vesting the Commission with "power and jurisdiction to supervise and regulate the rates and service of every public utility in this State"), S.C. Code Ann. § 58-3-170 (conferring jurisdiction upon the Commission to "supervise and fix all agreements, contracts, rates . . ." among telephone companies, S.C. Code Ann. § 58-9-1080 (authorizing the Commission to hear complaints involving telephone utilities) and S.C. Code Ann. § 58-9-280 (conferring jurisdiction on the Commission to provide for "unbundling of network elements")

7. The Commission also has jurisdiction under §251(d) (3) of the Act (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) respecting matters raised in this Petition.

STATEMENT OF FACTS

8. On February 11, 2004, Joint Petitioners filed jointly with this Commission a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket No. 2004-42-C.

9. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[4] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

10. On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 16, 2004 Joint Motion to Withdraw Petition for Arbitration ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide access to UNEs.[5] Specifically, the Abeyance Agreement provided for an abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-*USTA II* regulatory framework should be incorporated into the new agreements being arbitrated.[6] The Parties agreed therein to avoid negotiating/arbitrating change-of-law amendments to their existing interconnection agreements and agreed instead to continue to operate under their existing interconnection agreements until their arbitrated

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3 359 F.3d 554 (D.C. Cir. 2004).

4 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

5 The Abeyance Agreement was filed in the form of a Joint Motion in Docket No. 2004-42-C (filed July 16, 2004).

6 Abeyance Agreement at Paragraph 5.

successor agreements become effective.[7] Per the Abeyance Agreement, Joint Petitioners will be re-filing for arbitration and are currently planning to do so next week.

11. The Commission issued an order granting the Parties' Abeyance Agreement (*i.e.*, the Joint Motion) on October 6, 2004.

12. On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[8] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[9]

13. On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[10] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport.

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7 *Id.*

8 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

9 *Id.* ¶ 21.

10 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("*Triennial Review Remand Order*") ("*TRRO*"). BellSouth already has sought to overturn this order. *United States Telecom Ass'n et al. v. FCC*, Supplemental Petition for Writ of Mandamus, Nos. 00-1012 *et al.* (D.C. Cir.), filed Feb. 14, 2005 (BellSouth, Qwest, SBC and Verizon were parties to the pleading).

14. In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[11]

15. The *TRRO* will become an effective FCC order on March 11, 2005.[12]

16. On February 11 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds'... the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the *TRRO*."[13] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the *TRRO* related to 'new adds' to be self-effectuating," *i.e.*, "without the necessity of formal amendment to any existing interconnection agreements."[14] BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the *TRRO*.[15] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[16] On February 28, 2005, BellSouth issued a revised Carrier Notification indicating that it would refuse to provision copper loops capable of providing HDSL on March 11, 2004, as well.

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11 *Id* ¶ 233.

12 *Id* ¶ 235.

13 Carrier Notification at 1.

14 *Id.* at 2.

15 *Id.*

16 *Id.*

17. On February 14, 2005, BellSouth filed a submission in Docket No. 2004-316-C alleging that the "TRRO's provisions as to 'new adds' constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity of formal amendments to any existing interconnection agreements."[17]

DISCUSSION

A. The *TRRO* Is Not Self-Effectuating

18. Contrary to the positions asserted by BellSouth in its Carrier Notifications, the *TRRO* is not self-effectuating with regard to "new adds" or, for that matter, in any other respect (including any changes in rates of the availability of access to UNEs). In fact, in the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[18] Section 252 of the Act requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation. This process is not "self effectuating."

19. This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*.[19] With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[20] The FCC also stated that "we expect incumbent LECs and requesting carriers to

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17 BellSouth Submission, at 1-2.

18 *TRRO* ¶ 233.

19 The FCC also recognized that, pursuant to section 252(a)(1), carriers are free to negotiate alternative arrangements that would result in standards governing their relationships that differ from the rules adopted in the *TRRO*. *See id.* ¶¶ 145, 198, 228.

20 *Id.* ¶ 196.

negotiate appropriate transition mechanisms for such facilities through the section 252 process."[21]

20. With regard to high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[22] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[23]

21. With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[24]

22. Thus, the FCC in no way indicated that it was unilaterally modifying state commission approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date. The "different direction" BellSouth claims the FCC took with respect to "new adds" is not evident in the *TRRO*. Instead it is simply another diversion created by BellSouth.[25]

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21 *Id.* at note 519.

22 *Id.* ¶ 143.

23 *Id.* at note 399.

24 *Id.* ¶ 227.

25 BellSouth, in a pleading on this issue filed with the Georgia Commission, argues that the FCC can and did modify existing interconnection agreements in the manner alleged in its Carrier Notification. Neither aspect of the assertion is true. In support of its contention that the FCC can modify existing interconnection agreements, BellSouth cites the *Mobile-Sierra* doctrine. In so doing, however, BellSouth fails to reveal that the FCC has expressly found that "the *Mobile-Sierra* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements." *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11475 at note 50 (May 24, 2001). Even if that were not the case, there is simply no evidence that the FCC employed the *Mobile-Sierra* doctrine and made the requisite public interest findings for doing so in the *TRRO*. There is no express statement in the *TRRO* that says that the FCC intended to reform existing interconnection

23. Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO*. In the *TRO*, the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[26]

24. BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. The Commission must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans.

B. The Abeyance Agreement Requires BellSouth to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements

25. The terms of the Abeyance Agreement clearly require BellSouth to abide by the terms of the Parties' existing interconnection agreements until such agreements are replaced with new agreements currently being arbitrated. BellSouth and Joint Petitioners voluntarily agreed to continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the upcoming arbitration docket.

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agreements. And there is no discussion of why negating certain terms of existing interconnection agreements is compelled by the public interest. Instead, the FCC stated quite plainly in paragraph 233 that the normal section 252 negotiation/arbitration process applies.

26 *TRO* ¶ 701.

26. In the Abeyance Agreement, the Parties stated that they agreed to the abatement period so that they can "incorporate the negotiation of those issues precipitated by *USTA II*, as well as continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth."[27] To implement these shared objectives, BellSouth and the Parties agreed to "continue operating under their current Interconnection Agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement."[28]

27. In the Abeyance Agreement, BellSouth and the Joint Petitioners agreed to an orderly procedure for implementing whatever UNE rule changes ultimately resulted from *USTA II*. Since the Parties had all expended considerable resources in negotiating replacements to their expired interconnection agreements, and the process already was at the arbitration stage, it made no sense to anyone involved to waste time negotiating and arbitrating amendments to their soon-to-be-replaced expired interconnection agreements. Instead, all concerned agreed to identify the issues raised by *USTA II* and its "progeny" (i.e., the post-*USTA II* regulatory framework, including the FCC's Final Rules adopted in the *TRRO*[29]) and resolve them in the context of their arbitration proceeding to establish newly negotiated/arbitrated replacement interconnection agreements.

28. Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the Abeyance Agreement and make an end run around the Commission's

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27 Abeyance Agreement, at 2.

28 *Id.*, at 2.

29 The arbitration issues identified as a result of this process include Issue 23 (post federal transition period migration process), Issue 108 (*TRRO* / Final Rules), Issue 109 (*Interim Rules Order* intervening federal or state orders); Issue 110 (*Interim Rules Order* intervening court orders); Issue 111 (*Interim Rules Order* – transition plan / *TRRO* transition plan); Issue 112 (*Interim Rules Order* – frozen terms); Issue 113 (High Capacity Loop Unbundling Under 251/*TRRO*, 271, state law); Issue 114 (High Capacity Transport Unbundling Under 251/*TRRO*, 271, state law).

interconnection agreement arbitration process. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreements that it previously agreed would not be changed, and renege on its agreement that the Parties would continue to operate under those agreements pending the outcome of the ongoing interconnection arbitration proceedings. As a simple matter of contract law and regulatory procedure, the Commission cannot allow BellSouth to simply abrogate the Abeyance Agreement and end run the arbitration process. Moreover, for BellSouth to ignore the commitments made to the Joint Petitioners in their Abeyance Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1).

29. Joint Petitioners believe that BellSouth cannot implement the *TRRO* changes in law without modifying its interconnection agreements to reflect such rule changes. However, that is especially true with respect to the Joint Petitioners. BellSouth and the Joint Petitioners actually sat down and negotiated on that point immediately after *USTA II* became effective, agreed on the appropriate and orderly way to incorporate the post-*USTA II* rule changes into their new interconnection agreements, committed to continue operating under unchanged existing interconnection agreements UNE provisions until the newly negotiated/arbitrated agreements are finalized, and submitted this mutual agreement and understanding on how to implement *USTA II/TRRO* to the Commission for approval. BellSouth certainly cannot be permitted to usurp its commitments made to the Joint Petitioners in the Abeyance Agreement and to this Commission. All concerned have acted in reliance upon those commitments, and proceeded through the arbitration process on that basis.

CONCLUSION

30. BellSouth's recent Carrier Notices regarding the *TRRO* are baseless and thinly veiled attempts to breach and or unilaterally amend the Parties' existing interconnection agreements. Moreover, these notices signal an intent to breach the Abeyance Agreement and to usurp the arbitration about to be conducted by the Commission. Joint Petitioners will be irreparably harmed and South Carolina consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreements or the Abeyance Agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated via the section 252 process. As a matter of law, this Commission must ensure that Joint Petitioners have full and unfettered access to UNEs provided for in their existing interconnection agreements until such time as their agreements are superseded by the agreements to be arbitrated before the Commission.

31. Moreover, principles of equity and fairness dictate that BellSouth and Joint Petitioners should stand on equal footing and play by the same rules. Joint Petitioners have waited a long time to avail themselves of pro-CLEC changes of law such as commingling rules and clearer EEL eligibility criteria ushered in by the *TRO*. Indeed, both of those issues have been issues in the previous arbitration proceeding.[30] Even if they hadn't been arbitration issues, BellSouth has insisted on an all-or-nothing approach to implementing the changes-of-law ushered in by the *TRO*. BellSouth likewise must wait for the conclusion of the arbitration

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[30] Issue 26 addresses whether BellSouth must abide by the FCC's commingling rules (BellSouth insists that it is entitled to an unwritten exception to the rules) and it remains unresolved. Issue 50 addressed whether the EEL eligibility criteria should be incorporated to the agreement using the term "customer" (as in the rule) or another term defined by BellSouth in a manner that could be construed to limit Joint Petitioners' access to UNEs. BellSouth recently agreed to abide by the rule and the issue was resolved using Joint Petitioner's proposed language.

process to avail itself of *TRRO* changes of law favorable to it. This foundation of fairness is encapsulated in the Parties' Abeyance Agreement.

PRAYER FOR RELIEF

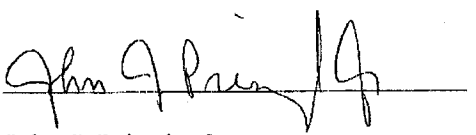
WHEREFORE, for the foregoing reasons, Joint Petitioners respectfully request that the Commission:

(1) declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by the interconnection agreements resulting from the upcoming arbitration docket;

(2) declare that the Abeyance Agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreements until such time as those Agreements are superseded by the agreements resulting from the upcoming arbitration docket;

(3) grant Joint Petitioners such other relief as the Commission deems just and proper.

Respectfully submitted,



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Dated: March 2, 2005

CERTIFICATE OF SERVICE

I, Jack Pringle, do hereby certify that I have, on this 22nd day of March, 2005, caused to be served upon the following individuals, by electronic mail and first class U.S. mail, postage prepaid, a copy of the foregoing:

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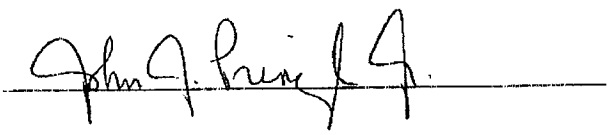

Exhibit 1

Attachment "A"

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs -- (Product/Service) -- Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5]

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005. . ."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

Exhibit 2

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) -- **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former Unbundled Network Elements ("UNE") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on Incumbent Local Exchange Carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing Interconnection Agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing Interconnection Agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing Interconnection Agreements. Therefore, while BellSouth will not breach its Interconnection Agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005, BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1, **HDSL** and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing Interconnection Agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any

[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶¶ 198

orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGNAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

Exhibit 3

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia*, "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise*." (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.

EXHIBIT SIX

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-316-C - ORDER NO. 2005-247

AUGUST 1, 2005

IN RE: Petition of BellSouth Telecommunications, Inc. to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.	))))	ORDER ADDRESSING PETITION FOR EMERGENCY RELIEF

This matter comes before the Public Service Commission of South Carolina (the Commission) on a Petition for Emergency Relief submitted by Nuvox Communications, Inc., Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Spartanburg, LLC, KMC Telecom III, LLC, and KMC Telecom V, Inc. (collectively, the CLEC Petitioners) on March 2, 2005, and a related letter from ITC^DeltaCom Communications, Inc. submitted to the Commission on February 23, 2005. This Order also disposes of the Emergency Petition filed by Amerimex Communications Corp. filed on March 4, 2005, and the similar letter filed by Navigator Telecommunications, LLC submitted on March 3, 2005. Amerimex subsequently withdrew its Emergency Petition.

The CLEC Petitioners request that this Commission grant the following relief: (1) declare that the transitional provisions of the Triennial Review Remand Order (TRRO) issued by the Federal Communications Commission (FCC) on February 4, 2005, are not self-effectuating, but rather are effective at such time as the parties' existing

interconnection agreements are superseded by the interconnection agreements resulting from their upcoming arbitration docket; and (2) declare that the Abeyance Agreement that they entered into with BellSouth Telecommunications, Inc. requires BellSouth to continue to honor the rates, terms and conditions of the parties' existing interconnection agreements until such time as those agreements are superseded by the agreements resulting from the upcoming arbitration docket.

The Commission has carefully reviewed the record in this matter, including the filings of the parties and the transcript of the oral argument presented, along with the controlling law. Guided by this Commission's duties under State law, the express terms of the TRRO, including its findings regarding public policy and the public interest, and based on this Commission's reading of the TRRO that the Federal Communications Commission (FCC) envisioned that the changes of law would be administered through an orderly process under State Commission supervision, we hold that the CLEC Petitioner's request for relief should be granted in part and denied in part as described herein.

We hold that, after June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order an Unbundled Network Element (UNE) from BellSouth and pay the Total Element Long Run Incremental Cost (TELRIC) rates for that item in regard to new customers seeking switching and high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90 day period is provided only for orderly negotiation and

service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

We also hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable).

Further, we hold that if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.

Lastly, we hold that the scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC Petitioners' Petition. Therefore, it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief. Further, where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation

that the parties will move expeditiously away from the specified UNE framework. In addition, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

A further explanation of our holdings follows.

I. NEW CUSTOMERS SEEKING SWITCHING, AND CERTAIN OTHER UNEs

We had instituted a deadline of June 8, 2005, as the date when CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. Again, this 90 day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

First, we agree with some 11 other State Commissions, which, as of April 15, 2005, had held that the TRRO does not permit new UNE orders of the above-noted facilities. The TRRO states repeatedly that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. This includes switching (TRRO, paragraphs 204, 227), and certain loops and transport (TRRO, paragraphs 142, 195).

The CLEC Petitioners stated a belief that TRRO, paragraph 233 requires BellSouth to follow a contractual change-of-law process before it can cease providing

these facilities. The paragraph, however, is clear that carriers must implement changes to their interconnection agreements consistent with the FCC's conclusions in the TRRO. Further, we agree with the New York Commission, which stated that "Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005." Thus, the right to assert contractual obligations must be read congruently with one of the overall goals of the TRRO, which was that certain classes of UNEs were no longer to be made available after March 11, 2005, at TELRIC prices.

Although we recognize that our conclusion with regard to new customers and new UNEs may be contrary to certain interconnection agreements, we believe that the FCC has the authority to make its order effective immediately regardless of the contents of particular interconnection agreements. Clearly, the FCC may undo the effects of its own prior decisions, which have been vacated by the Federal Courts on several occasions. The FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition." TRRO, paragraph 2. In addition, the South Carolina Supreme Court has held that the right to contract is not absolute, but is subject to the state's police powers which may be exercised for protection of the public's health, safety, morals or general welfare. In Anchor Point, et al. v. Shoals Sewer Company and the Public Service Commission of South Carolina, 308 S.C. 422, 418 S.E. 2d 546 (1992), the Court held that where a matter affected the public interest, the Commission, exercising the State's police powers, could issue an order which altered a

master deed. Clearly, under the police power, this Commission can alter interconnection agreements if a matter of public welfare is involved. Since the FCC determined that the UNE Platform harms competition and is therefore contrary to the public interest, we believe that this Commission may modify interconnection agreements at least to the degree that said agreements may be read to require BellSouth to offer new UNEs to new customers.

Further, in keeping with our desire to bring about an orderly transition period, we have held that after June 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This is a 90-day extension of time from the TRRO-imposed March 11, 2005, deadline for orderly negotiation and service transition purposes. However, we emphasize that any new rates agreed upon between parties for these services will be subject to true-up back to March 11, 2005, based on the new contractual arrangements negotiated by the parties. Thus, the new rates will be consistent with the intent of the TRRO not to allow availability of new adds to new customers after March 11, 2005.

II. EMBEDDED BASE OF EXISTING CUSTOMERS

We hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March

10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable). (TRRO, paragraphs 227, 228, 145, 198)

Paragraph 228 of the TRRO states that unbundled access to local circuit switching during the transition period should be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar. With regard to the transition pricing of unbundled dedicated transport facilities for which the FCC determines that no Section 251(c) unbundling requirement exists, according to paragraph 145 of the TRRO, such facilities shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that transport element. Paragraph 198 of the TRRO adopts, for transition pricing of unbundled high-capacity loops for which the Commission determines that no Section 251 (c) unbundling requirement exists, a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that loop element.

The TRRO states as its reasoning that moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while

at the same time, these price increases, and the limited duration of the transition provide significant protection of the interests of incumbent LECs in those situations where unbundling is not required. TRRO, paragraph 198. We believe that the same reasoning is appropriate for our use of this transition pricing mechanism, and we hereby adopt the TRRO reasoning as stated.

III. REASONABLE DILIGENCE

Again, if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for by its interconnection agreements. TRRO, paragraph 234.

IV. ABEYANCE AGREEMENTS

We do not believe that the Abeyance Agreement offers the CLEC Petitioners an alternative method of relief in this case. The CLEC Petitioners and BellSouth are parties to an Abeyance Agreement that provides in part:

> Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by USTA II, as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion.

> Additionally, the parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to USTA II and its progeny.

The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Agreement says nothing of changes of law that might be mandated by the FCC in the TRRO. In other words, adopting the Joint Petitioners' argument would require this Commission to find that the scope of the Abeyance Agreement was so wide that, even though the TRRO proceeding is never mentioned in the Agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the current Agreement even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results. Accordingly, the Abeyance Agreement provides no alternative remedy for the Joint Petitioners in the present case.

CONCLUSION AND ORDER

Because of the reasoning stated above, we hold that:

1. After June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking

switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90-day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties;

2. The transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e., TELRIC rates + $1 or 115% as applicable);

3. If a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements; and

4. The scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC's Petition; therefore it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief.

5. Where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation that the parties will move expeditiously away from the specified UNE framework. Further, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice-Chairman

(SEAL)

EXHIBIT SEVEN